No. 79-724

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT CORTELLESSO AND RALPH ALTIERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILLIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-30) is reported at 601 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on July 19, 1979. The petition for a writ of certiorari was filed on November 5, 1979, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the challenged search warrants described the property to be seized with sufficient particularity.

STATEMENT

1. In an indictment filed in the United States District Court for the District of Rhode Island, petitioners were charged with conspiring to possess and conceal stolen goods moving in interstate commerce, in violation of 18 U.S.C. 371, 659 and 2315, and with receiving and concealing goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315 and 2 (A. 72). [1] Petitioner Cortellesso also was charged with possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659, with removing property before its seizure, in violation of 18 U.S.C. 2232, and with possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. App. 1202(a)(1).

a. After the indictment was filed, petitioners moved to suppress evidence that had been seized from petitioner Cortellesso's home and from his clothing store under warrants issued on April 1 and 4, 1977. The affidavit submitted in support of the search warrants issued on April 1, 1977, stated that three confidential informants of proven reliability knew from personal observations and conversations with petitioner Cortellesso that he used his clothing store to conduct an illegal fencing operation and used his home as a "warehouse" for his store (A. 21, 24-25, 29-30, 36, 49). The affidavit also summarized several telephone conversations intercepted (pursuant to a prior court order) at petitioner Cortellesso's store. These conversations indicated that

[1] "A." refers to the Appendix filed in the court of appeals.

petitioner was about to receive a shipment of stolen clothing consisting of Pierre Cardin suits (from which the labels had been removed), 25 cashmere sport coats and a large load of "ultra suede" sports jackets. The affidavit stated that further investigation had established that the anticipated shipment of stolen goods had arrived (A. 47-50). Based on these and other facts detailed in the affidavit, the magistrate issued warrants authorizing the search of petitioner Cortellesso's store and home and the seizure of stolen "men's suits [and] sports jackets" which had traveled in interstate commerce (Pet. 3).

b. Federal agents executed the warrant at petitioner's clothing store on April 2, 1977. They seized 23 Pierre Cardin suits, 5 suede sport jackets, and 25 cashmere sport coats (A. 83). Labels in some of the Pierre Cardin suits had been totally removed, while others had been taken out but sewed back in (A. 87, 169, 177-178).[2] The agents did not seize "hundreds and hundreds" of other items and articles of clothing that were stocked at petitioner's store (A. 85).

The warrant for the search of petitioner Cortellesso's home was also executed on April 2, 1977. During that search, agents seized two handguns and other items not listed in the warrant after they learned from the National Crime Information Center and a local police department that the items were stolen (A. 141-143).[3] The agents, however, did not seize a large quantity of other clothing,

[2] Other items unrelated to this case were also seized during this search. Petitioners conceded in the court of appeals (Br. 15-16) that these other seizures do not affect the legality of the seizures of the clothing that is here in dispute. See also Pet. App. 22-23.

[3] These seizures are not challenged here (Pet. App. 23).

not mentioned in the warrant, which subsequent investigation established was stolen from interstate shipments (A. 60-63, 144-146, 163-165).

c. On the basis of their observation of additional stolen goods during the execution of these warrants, the agents obtained additional warrants on April 4 and again searched petitioner Cortellesso's store and home. Various items of clothing listed in the April 4 warrants were seized from Cortellesso's store (A. 71). No additional property was seized from Cortellesso's home, however, because the allegedly stolen property had been removed (A. 75).

2. After a hearing, the district court granted petitioner's motion to suppress the evidence seized pursuant to the April 1 search warrants. The court concluded that the warrants did not describe the goods to be seized with sufficient particularity (Pet. App. 15-17). The district court also concluded that the evidence seized pursuant to the April 4 search warrants must be suppressed as the fruits of the earlier, unlawful search (A. 226-233).

On appeal, the court of appeals reversed and remanded the case for further proceedings (Pet. App. 21-30). The court concluded that the description in the warrant of the goods to be seized was as precise and particular as the circumstances permitted (Pet. 27-28).

ARGUMENT

1. Petitioners seek review of an interlocutory ruling that may be made moot by further proceedings. The judgment that petitioners challenge is not a conviction, but merely a ruling on the admissibility of evidence at their future trial. The court of appeals' decision places petitioners in no different position than if the district court had ruled against them in the first instance. Since

such a ruling would not have been appealable by petitioners as an interlocutory order (*DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940)), review of the court of appeals' decision at this time would be premature. If petitioners are acquitted at trial, their claim will be moot. If, on the other hand, petitioners are convicted, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment against them.

2. In any event, the court of appeals correctly held that the challenged warrants adequately described the property to be seized. The decision in this case does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

a. The April 1, 1977, search warrant authorized the agents to seize the following property from petitioner Cortellesso's clothing store (A. 8):[4]

> Stolen goods, wares and Merchandise valued in excess of $5,000 which have travelled in interstate commerce, in particular men's suits, sports jackets, women's boots, leather coats, fur coats, rain coats, inventory records, bills, sales records, bills of sale and any document which shows proof of purchase, value and origin of shipment, which are evidence of violations of Title 18, United States Code, Section 2314, 2315 and 371.

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[4]The April 1 search warrant for petitioner Cortellesso's home described the property to be seized in virtually identical terms (A. 9). Petitioners do not challenge the adequacy of the description in the April 1 warrants of the books and records subject to seizure. They also do not contest the sufficiency of the description of property in the April 4 warrants.

Petitioners contend (Pet. 3, 9) that the description of property to be seized in the search could have been made more specific by including the information that the stolen goods included *Pierre Cardin* men's suits and *cashmere* and *ultra suede* sport jackets. Petitioners argue that, without this additional information, the April 1 search warrants are invalid because they do not describe the property to be seized with sufficient particularity.

But the Fourth Amendment does not, as petitioners contend, require that a search warrant contain the most exacting description conceivable. It is sufficient that the description permits the agents reasonably to ascertain and identify the items to be seized. See, *e.g.*, *Steele* v. *United States No. 1*, 267 U.S. 498, 503 (1925); *Anglin* v. *Director*, 439 F. 2d 1342, 1347 (4th Cir.), cert. denied, 404 U.S. 946 (1971); *Gurleski* v. *United States*, 405 F. 2d 253, 257 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969).[5] The search warrants challenged by petitioners

[5]Petitioners' reliance (Pet. 4-5) on *Lo-Ji Sales, Inc.* v. *New York*, No. 78-511 (June 11, 1979), is misplaced. The defect in the warrant in *Lo-Ji Sales* was that it "did not purport" to describe the materials to be seized with particularity and left it entirely "to the discretion of the officials conducting the search to decide what items were obscene * * *" (slip op. 5). By contrast, the warrant in this case limited the scope of the goods to be seized to particular types of clothing and other goods suspected of being transported in violation of federal laws (Pet. App. 28). Moreover, this Court has observed that the particularity requirement is more stringent when the things to be seized are not stolen goods but "are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas*, 379 U.S. 476, 485 & n.16 (1965).

Petitioners also err in interpreting *Marron* v. *United States*, 275 U.S. 192, 196 (1927), to require that the descriptions in the warrant be so exacting that no judgment whatever need be exercised by the officers executing the warrant (Pet. 4). Petitioners' interpretation of *Marron* is both unrealistic and contrary to this Court's recognition that, in appropriate cases involving the seizure of stolen goods or

provided, in relevant part, that only stolen men's suits and sport jackets that had travelled in interstate commerce and were located at petitioner Cortellesso's home and place of business were to be seized. The court of appeals correctly determined that, in the circumstances of this case, this description was sufficiently particular and concrete to guide the officers in executing the warrant (Pet. App. 26-28).[6]

In the first place, as the court of appeals concluded, further particularization in the warrant was "a practical impossibility" (Pet. App. 28):

> The affidavits revealed that labels had been removed from the Pierre Cardin suits so that a more precise description would not have assisted the officer in the field and, that with respect to other stolen items, only a generic description was known. Accordingly, we believe that the affidavits established that the officers who applied for the search warrants could only have been expected to describe the generic class of the items he [*sic*] sought [*id.* at 27].

contraband, "generalized [descriptions may] pass constitutional muster * * *." *Stanford* v. *Texas*, *supra*, 379 U.S. at 486, citing *Steele* v. *United States No. 1*, *supra*, 267 U.S. at 504. See also *Andresen* v. *Maryland*, 427 U.S. 463, 483 (1976).

[6]Petitioners' contention (Pet. 8) that the "agents at the clothing store testified they did not have any idea what they were supposed to seize" is unsupported. Petitioners have not pointed to, and we have not found, any such testimony in the record. What the record shows is that the Justice Department attorney who helped draft the April 1 search warrants carefully supervised the agents executing the search warrant at the store (A. 82, 90, 171, 180), and the agents did not seize any property without the authorization of the attorneys in charge of the investigation (A. 93, 108, 114, 126, 129-130, 173-174, 188).

Moreover, further particularization was unnecessary because, as the court of appeals stated, "the affidavits presented to the magistrate established a specific and detailed foundation for the belief that a large collection of similar contraband was present on the premise to be searched," and "the affidavits did not leave the magistrate speculating whether the executing officers could differentiate the stolen goods from the legitimate inventory since there was a great likelihood that the goods to be seized would be indeed stolen." In these circumstances, the particularity requirement of the Fourth Amendment is satisfied by a generic description of the stolen goods because it is highly likely that the items seized "would be indeed stolen," and there is an accordingly small likelihood of erroneous seizure.[7] See, *e.g.*, *United States* v. *Scharfman*, 448 F. 2d 1352, 1354-1355 (2d Cir. 1971); *Vitali* v. *United States*, 383 F. 2d 121, 122 (1st Cir. 1967); *James* v. *United States*, 416 F. 2d 467, 473 (5th Cir. 2969), cert. denied, 397 U.S. 907 (1970); *Smith* v. *United States*, 321 F. 2d 427, 430 (9th Cir. 1963).

b. Finally, we note that the court of appeals did not hold, as petitioners contend (Pet. 6), that the description on the face of the warrant is irrelevant in determining whether it is sufficiently particular. Nor did the court hold, as petitioner states (Pet. 10), that the supporting affidavit could "provide particularity of descriptions

[7]These theoretical probabilities are in fact borne out in this case. From the entire inventory of petitioner Cortellesso's clothing store, the agents seized only 25 cashmere coats, 23 Pierre Cardin suits (with indications that the labels had been removed) and 5 suede sport coats. This law enforcement activity is hardly reminiscent of the general ransacking of homes by officers of the Crown under writs of assistance in the Eighteenth Century. Cf. *Lo-Ji Sales, Inc.* v. *New York*, *supra*, slip op. 5.

otherwise lacking on the face of the warrant, even though the affidavits did not accompany the warrants after they were issued and were not incorporated by reference in the language of the warrant." To the contrary, the court of appeals agreed that the sufficiency of the warrant's description must be determined by examination of the warrant itself (Pet. App. 27). The court held only that, on the facts and circumstances of this case, the affidavit showed that it was appropriate and necessary to utilize a generic description of goods to be seized under the warrant and that a more specific description was infeasible (*ibid.*). The decision of the court of appeals thus does not, as petitioners contend (Pet. 11-12), conflict with the decisions in *In Re Search Warrant Dated July 14, 1977*, 572 F. 2d 321 (D.C. Cir. 1977), cert. denied, 435 U.S. 925 (1978), *United States* v. *Johnson*, 541 F. 2d 1311 (8th Cir. 1976), and *United States* v. *Womack*, 509 F. 2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney

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